In the District Court of the United States for the Western District of Missouri, Central Division

No. 5040

A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY, AND A. L. MCCORMACK, DEFENDANTS

ORDER APPOINTING COUNSEL

This contempt proceeding, as a proceeding incidental to the insurance litigation (Equity Cases Nos. 270 to 426, inclusive), is, in no strict sense, an ordinary criminal case brought by the government against individuals. The office of United States Attorney, as such, is under no duty to carry on a proceeding of this character. This court requested Mr. Richard K. Phelps, then Acting United States Attorney, as *amicus curiae,* to prepare and prosecute the information in contempt. These things he has done with fine ability and the court desires publicly and on the

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record to express its appreciation of his services.

It now has been indicated that an appeal will be taken from the judgment of the court. The work incident to that appeal will be great. The court does not feel that the whole burden should be imposed on one man nor that the attorneys who represent the appellee, if an appeal is taken, should be uncompensated for their services. The court thinks they should be reasonably compensated and that it is right and proper that their compensation should be taxed as costs in the insurance litigation to which this proceeding is incidental.

It is therefore ordered that Mr. Richard K. Phelps and Mr. William S. Hogsett be, and they are hereby appointed as special counsel and as *amici curiae* to represent the appellee in any appeal taken from the judgment of this court in this proceeding.

KIMBROUGH STONE,
Circuit Judge.

ALBERT L. REEVES,
District Judge.

MERRILL E. OTIS,
District Judge.

Filed in the United States District Court June 7, 1941.

In the District Court of the United States for the Western District of Missouri, Central Division

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No. 5040

A proceeding in contempt incidental to Equity Cases Nos. 270 to 426, inclusive

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UNITED STATES OF AMERICA, PLAINTIFF (APPELLEE)

v.

THOMAS J. PENDERGAST, ROBERT EMMETT O'MALLEY, AND A. L. MCCORMACK, DEFENDANTS (APPELLANTS)

APPELLEE'S JURISDICTIONAL STATEMENT AND MOTION TO DISMISS THE SEPARATE APPEALS OF THOMAS J. PENDERGAST AND ROBERT EMMETT O'MALLEY, TAKEN JULY 2, 1941

Now comes plaintiff (appellee) United States of America and respectfully states that the Supreme Court of the United States is without jurisdiction of the separate appeals to that court, taken on July 2, 1941, by defendants (appellants) Thomas J. Pendergast and Robert Emmett O'Malley, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by their respec-

tive assignments of error; and said appellee moves that the separate appeals so taken by said defendants to the Supreme Court of the United States, and each of said appeals, be dismissed, for the following reasons:[1]

First. The nature and essential facts of the case are clearly stated in the opinions below, copies of which are attached to the jurisdictional statements of defendants (appellants) Pendergast and O'Malley. The opinion on motions to abate and quash the information in contempt is reported at 35 F. Supp. 593, and the opinion filed after the hearing is reported at 39 F Supp. 189.

Second. The three-judge district court was properly convened to hear and determine the insurance rate cases, and had jurisdiction to hear and determine the same and all issues therein, under the provisions of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code, Sec. 380, because: The plaintiff insurance companies in said cases each prayed for an interlocutory injunction, and for a permanent injunction, suspending and restraining the enforcement, operation and execution of statutes of Missouri, by restraining the action of the Superintendent of the Insurance Department and of the Attorney General of said

[1] The jurisdictional statements filed by said appellants are identical; therefore appellee files one jurisdictional statement and motion to dismiss, applicable to the appeals of both appellants.

state, in the enforcement and execution of said statutes, and in the enforcement and execution of an order (dated May 28, 1930, disapproving the filing by said insurance companies of increased rates) made by said Superintendent of the Insurance Department acting under and pursuant to said statutes, upon the ground of the unconstitutionality of said statutes. (See bill in equity, and the amended bill and supplemental bill, in one of said cases, entitled *American Insurance Company* v. *Thompson et al.*, No. 270, which are substantially identical with like bills in the other cases. Said bills appear in the transcript.) The insurance companies pressed their applications for interlocutory injunction, and the same were presented to and granted by said three-judge court. The following decisions by the Supreme Court sustain the jurisdiction of said three-judge court in the insurance rate cases:

National Fire Ins. Co. v. *Thompson, Supt. of the Insurance Dept. of the State of Missouri,* 281 U. S. 331, 333.

Oklahoma Natural Gas Co. v. *Russell,* 261 U. S. 290, 292.

Herkness v. *Irion,* 278 U. S. 92, 93–4.

United Fuel Gas Co. v. *Public Service Commission,* 278 U. S. 322, 323.

Tyson & Brother v. *Banton, District Attorney,* 273 U. S. 418, 428.

Board of Public Utility Commissioners v. *New York Telephone Co.,* 271 U. S. 23, 26.

Lawrence v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588, 590.
Banton v. *Belt Line Railway Corp.*, 268 U. S. 413, 415.
Gilchrist v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 189–190.
Williams v. *Standard Oil Co.*, 278 U. S. 235, 238–9.

The Superintendent of the Insurance Department of the State of Missouri is "an administrative board or commission" within the meaning of 28 U. S. Code Sec. 380.

Moore, Insurance Commissioner v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320.
National Fire Insurance Co. v. *Thompson, Supt. of the Insurance Dept. of the State of Missouri*, 281 U. S. 331, 333.
Cline, District Attorney v. *Frink Dairy Co.*, 274 U. S. 445, 449, 451.
Tyson & Brother v. *Banton, District Attorney*, 273 U. S. 418, 428.
Banton v. *Belt Line Railway Corp.*, 268 U. S. 413, 415.

Third. The three-judge court, having jurisdiction of the insurance rate cases, had inherent power to punish for contempt arising out of and incidental to those cases.

Michaelson et al v. *United States*, 266 U. S. 42, 65–66.
Myers et al. v. *United States*, 264 U. S. 95, 103.
United States v. *Hudson and Goodman*, 11 U. S. 32, 7 Cranch 32, 34.

The contempt consisted of carrying out a conspiracy between one Charles R. Street (agent for the plaintiff insurance companies, now deceased), defendant McCormack (who acted as go-between), defendant Pendergast (a political boss) and defendant O'Malley (defendant Superintendent of the Insurance Department) by corrupt means, including bribery of O'Malley, to obtain a decree of the three-judge court approving a so-called settlement of the insurance rate cases, and authorizing distribution of about $10,000,000 in impounded premiums. The so-called settlement provided that 20 percent, or approximately $2,000,000, would go to the policyholders and 80 percent, or approximately $8,000,000, would go to the insurance companies. According to the secret agreement of the conspirators, Pendergast's "fee," contingent on bringing this "settlement" about, was to be $500,000—later increased to $750,000; and of this sum he was paid $440,000 by the insurance companies, out of which he paid the $62,500 bribe to Superintendent O'Malley, and $62,500 to the intermediary McCormack. A decree authorizing distribution of the impounded premiums was obtained from the three-judge court, by the filing in open court of a stipulation of the parties and motion for decree alleging the "settlement," and upon assurances by the parties (through counsel) in open court that the "settlement" had been made in good faith as the result of negotiations at arm's length, and was for the best interest of the

policyholders. The bribery and corruption were of course concealed from the court. The decree was thus corruptly obtained by acts and representations in open court. In accordance with the decree the court's custodian, from time to time during the ensuing three years, continued distribution of the impounded premiums. In the spring of 1939 the bribery and corruption came to light, through investigation activities by the Income Tax Division of the Treasury Department of the United States. The three-judge court learned of it, and this contempt proceeding followed. (The subsequent history of the insurance rate litigation appears in *American Insurance Co.* v. *Lucas,* 38 F. Supp. 896, and see opinion on insurance companies' motion for new trial at 926.) During the three-year interval, while the conspiracy was unknown, and as late as March, 1939, two of the conspirators, in accordance with the agreement of all, perpetrated affirmative acts of concealment to keep the bribery and corruption hidden from the three-judge court. Under these facts, the defendants' contempt of court clearly grew out of and was incidental to the insurance rate cases, and the three-judge court, against which the contempt was committed, had exclusive jurisdiction to punish it.

In re Debs, 158 U. S. 564, 594–5.
Myers v. *United States,* 264 U. S. 95, 104.
Michaelson v. *United States,* 266 U. S. 42, 65–6.

Merchants' Stock & Grain Co. v. *Board of Trade* (8 C. C. A.), 201 Fed. 20, 27.
Sullivan v. *United States* (8 C. C. A.), 4 F. (2d) 100, 101.
Dunham v. *United States* (5 C. C. A.), 289 Fed. 376, 378.

Fourth. The appeals from the contempt judgment by Pendergast and O'Malley to the Supreme Court of the United States, by the filing of notices of appeal, on July 2, 1941, should be dismissed, because: If such direct appeals were permitted by law at all (which appellee denies, for reasons hereinafter stated), they could only be taken by petitions for appeal accompanied by assignments of error. (Supreme Court Rule 9; and compare Rule 72 of the Rules of Civil Procedure.) The purported appeals by notices filed July 2, 1941, do not comply or even purport to comply with any of the requirements of a notice of appeal in criminal cases. (Rule III of the Rules of Practice and Procedure in Criminal Cases Promulgated by the Supreme Court of the United States, May 7, 1934.)

Fifth. None of said appeals taken by said defendants Pendergast and O'Malley on July 2, 1941, whether by filing notices of appeal or by filing petitions for appeal accompanied by assignments of error, is authorized by any provision of Sec. 266 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 380, which is the statute upon

which said defendants, in their respective jurisdictional statements, rely to sustain the jurisdiction of the Supreme Court of the United States. The only direct appeal to the Supreme Court authorized by said section is (a) an appeal from an order of a three-judge court granting or denying an interlocutory injunction, or (b) an appeal from a final decree granting or denying a permanent injunction, in the type of case described in said section. The appeals which have been taken to the Supreme Court by defendants Pendergast and O'Malley are not appeals from an order granting or denying an interlocutory injunction; nor are they appeals from a final decree granting or denying a permanent injunction. Therefore said appeals do not fall within either category; and are not authorized by any provision of said section.

Sixth. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 345, upon which said defendants in their respective jurisdictional statements also rely, does not authorize said appeals to the Supreme Court, because: Said appeals obviously are not authorized by any provision of 15 U. S. Code Sec. 29 (relating to suits under the Anti-Trust Laws), or by any provision of 49 U. S. Code Sec. 45 (relating to suits under the Interstate Commerce Act), or by any provision of 18 U. S. Code Sec. 682 (relating to direct appeals by the United States in certain criminal cases), or by any provision of 28 U. S. Code Secs.

47 or 47a (relating to injunctions affecting orders of the Interstate Commerce Commission), or by any provision of 7 U. S. Code Sec. 217 (relating to suits affecting orders of the Secretary of Agriculture); and, as shown in the preceding paragraph, said appeals are not authorized by any provision of 28 U. S. Code Sec. 380. Section 238 of the Judicial Code as amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code 345, does not provide for a "direct review" by the Supreme Court of every appeal which may be taken in any case mentioned in the five different statutes or parts of statutes there listed; but, on the contrary, provides for such direct review by the Supreme Court only "where it is so provided" in the sections themselves. For example, a direct appeal to the Supreme Court may be had under 18 U. S. Code Sec. 682 only in the specific cases therein provided. (*United States* v. *Borden & Co.*, 308 U. S. 188, 193, and cases cited.)

Seventh. Defendants Pendergast and O'Malley have taken timely appeals from the judgments in question to the Eighth Circuit Court of Appeals, as shown by their respective jurisdictional statements. By the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, as amended, 28 U. S. Code Sec. 225 (Section 128 of Judicial Code as amended), the Circuit Court of Appeals is given exclusive jurisdiction of all appeals from the District Court in all cases not falling within the provisions of Section 238 of the Judicial Code as

amended, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, 28 U. S. Code Sec. 345. Therefore the situation presented here is radically different from that presented in *Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U. S. 208, 213; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392; *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 19; *Phillips* v. *United States,* 312 U. S. 246, 85 Law Ed. 460, 465; and *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U. S. 243, 252, cited in appellants' jurisdictional statements. In each of those cases the time for appeal to the Circuit Court of Appeals had expired. A dismissal by the Supreme Court of the appeals taken to that court by Pendergast and O'Malley will not deprive them of the right to have the judgment in question reviewed on appeal; and, to the contrary, they may have the judgment reviewed by the Eighth Circuit Court of Appeals, which has exclusive jurisdiction thereof. A timely appeal having been taken to that court, the judgment can be reviewed there, although it was rendered by three judges.

Phillips v. *United States,* 312 U. S. 246, 254, 85 Law Ed. 460, 465.
Healy v. *Ratta,* 289 U. S. 701.
Healy v. *Ratta,* 292 U. S. 263, 264.

Eighth. The Supreme Court of the United States has held that it does not have jurisdiction of a direct appeal from a judgment in contempt rendered by a District Court. (*Farmers' &*

Mechanics' National Bank v. *Wilkinson,* 266 U. S. 503, 506.)

Ninth. None of the cases cited in appellants' jurisdictional statements sustains jurisdiction in the Supreme Court of the United States of the appeals herein.

In *Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U. S. 208, 213; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392; *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 19; and *Phillips* v. *United States,* 312 U. S. 246, 254, 85 Law Ed. 460, 465, the Supreme Court held it had no jurisdiction of the direct appeals there involved. But in each of those cases the time for appeal to the Circuit Court of Appeals had expired, and for that reason alone, and in order to save the appellants' right to review, the court vacated the decree below and remanded the cause for further proceedings independently of Section 266 of the Judicial Code (28 U. S. Code Sec. 380). In *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U. S. 243, 252, the decision was to the same effect, except there the jurisdictional statute involved was Section 3 of the Act of August 24, 1937. Obviously these cases are without influence here, because Pendergast and O'Malley have not lost their right of review, and have in fact appealed to the Eighth Circuit Court of Appeals.

In *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 321, and *Smith* v. *Wilson*, 273 U. S. 388, 391, the Supreme Court dismissed direct appeals from the District Courts, because in each case the application for preliminary injunction was not pressed—and in the *Moore* case there was no request for a three-judge court. Clearly those cases are without influence here.

In *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 560, and *Terminal Railroad Ass'n* v. *United States*, 266 U. S. 17, 32, the Supreme Court held that the direct appeals were authorized under the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823. Plainly those cases are not in point.

In *Arkadelphia Milling Co.* v. *St. Louis & South Western Railway Co.*, 249 U. S. 134, 142, and *St. Louis, Iron Mountain & Southern Railway Co.* v. *Hasty*, 255 U. S. 252, 256, the Supreme Court held that direct appeals were authorized because the decrees appealed from were entered in cases which involved the construction and application of the Federal Constitution, within the meaning of Section 238 of the Judicial Code. Manifestly those cases are not in point.

In *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 457, no question of direct appeal was involved at all.

Tenth. In subdivision 7 of each jurisdictional statement filed by appellants Pendergast and O'Malley, appellant asserts that the three-judge

court erred in certain respects. These assertions of error go to the merits, and have no place in appellants' jurisdictional statements. Appellee therefore submits no response thereto in this jurisdictional statement, and reserves its response until such time as it may file its brief on the merits.

WHEREFORE plaintiff (appellee), United States of America, moves that the appeals taken to the Supreme Court of the United States on July 2, 1941, by defendants Thomas J. Pendergast and Robert Emmett O'Malley, respectively, by the filing of their respective notices of appeal, and by the filing of their respective petitions for appeal accompanied by assignments of error, be dismissed.

Respectfully submitted.

RICHARD K. PHELPS,
WILLIAM S. HOGSETT,
Counsel for Plaintiff (Appellee)
United States of America.

Received copies hereof this 11th day of July 1941.

JOHN G. MADDEN,
Counsel for Defendant (Appellant)
Thomas J. Pendergast.

JAMES P. AYLWARD,
GEORGE V. AYLWARD,
RALPH M. RUSSELL,
Counsel for Defendant (Appellant)
Robert Emmett O'Malley.

Filed in the United States District Court July 11, 1941.

[Supplement to appellee's motion to dismiss the appeals in *Pendergast* v. *United States*, No. 568, and *O'Malley* v. *United States*, No. 569]

The Solicitor General joins in this motion to dismiss the appeals, although he has not participated in its preparation, in the belief that by so doing he will facilitate presentation to the Court of the arguments of counsel appointed to prosecute the contempt proceedings by the three-judge court. The following paragraphs are presented on behalf of the United States Government:

1. The three-judge court was convened pursuant to section 266 of the Judicial Code (28 U. S. C., sec. 380) and that court properly assumed jurisdiction to punish a contempt against it. *Michaelson* v. *United States*, 266 U. S. 42, 65–66. Appellants base their chief claim of appellate jurisdiction in this Court upon section 266, as amended by the Act of February 13, 1925. But a direct appeal to this Court is authorized by that section only from an order granting or denying an interlocutory or final injunction. *Public Service Commission* v. *Brashear Lines*, 306 U. S. 204. This plainly is not such a case.

2. Appellants also place some reliance upon section 238 of the Judicial Code (28 U. S. C., sec. 345). This case falls within none of the categories there specified (certain suits under the Anti-Trust laws and the Interstate Commerce Act, certain pretrial decisions against the United

States in criminal cases, and proceedings to enjoin enforcement of the orders of the Interstate Commerce Commission and of the Secretary of Agriculture under the Packers and Stockyards Act).

3. Appellants have also filed timely appeals to the circuit court of appeals. That court would appear to have jurisdiction. Section 128 of the Judicial Code (28 U. S. C., sec. 225); *Healy* v. *Ratta*, 289 U. S. 701, 67 F. (2d) 554, 292 U. S. 263; *Phillips* v. *United States*, 312 U. S. 246, 254. There is, accordingly, no occasion to reinstate the case below in order to preserve appellants' right to appeal.

It is therefore respectfully submitted that these appeals should be dismissed.

CHARLES FAHY,
Charles Fahy,
Acting Solicitor General.

SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941